NO. 87-728

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

VERMONT CASTINGS, INC.,
Petitioner,
v.
GREGGAR S. ISAKSEN
d/b/a APPLEWOOD STOVE WORKS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT GREGGAR S. ISAKSEN IN RESPONSE TO PETITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, when one party, in direct competition with and having economic power over another, coerces the other to charge certain prices in interstate commerce and the other submits to the coercion and charges the prices but does not inform the coercing party that he is going to do what he is being coerced to do, there is a violation of §1 of the Sherman Act.

2. Whether *United States v. Colgate & Co.*, 250 U.S. 300 (1919) and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) should be regarded as authority for the proposition that combinations in restraint of trade achieved by coercion are allowed by §1 of the Sherman Act.

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POSITION OF THE RESPONDENT

The respondent, Greggar S. Isaksen, joins in the petition of Vermont Castings, Inc. for a writ of certiorari in this matter if the Court grants a writ of certiorari pursuant to the petition of Greggar S. Isaksen filed on October 14, 1987 as number 87-610. The Court's resolution of the questions presented by each petition would likely have a bearing on the questions presented in the other. On the other hand, if the Court were to deny certiorari in case number 87-610, the respondent would oppose the granting of certiorari in this case number 87-728.

COUNTERSTATEMENT OF THE CASE

We call attention to the Statement of the Case in the petition for writ of certiorari by Greggar S. Isaksen in case number 87-610 and incorporate that Statement herein by reference.

SUMMARY OF THE ARGUMENT

The court of appeals correctly rejected the literal reading of footnote 9 in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Pet. App. pp. 7a-8a. That reading would hold that some types of contracts restraining prices are not prohibited by §1 of the Sherman Act.

The issues answered in *Monsanto* as well as *United States v. Colgate & Company*, 250 U.S. 300 (1919) pertained only to a possible contract or conspiracy. *Colgate* was decided on the basis that an agreement was necessary for a Sherman Act combination and that no such agreement was alleged. This view, however, was disavowed in *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), as well as in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911); *Eastern States R.L.D. Asso. v. United States*, 234 U.S. 600 (1914); *Federal Trade Com. v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) and has not been followed in numerous court of appeals decisions.

Regardless of whether prices are restrained by contract or conspiracy or combination caused by coercion or other means the actions are illegal.

The court of appeals correctly recognized that, when there is a "*Colgate*" type of an announcement by a manufacturer to dealers that they will be cut off if they do not comply with pricing requests and dealers comply, they have been induced by threats to charge the requested prices. The court said that when dealers comply "there is a realistic sense in which the threat of termination has induced the dealers to agree not to cut prices - to agree, in

other words to fix prices." Pet. App. p. 8a. We submit that what occurs is not so much an agreement but rather a combination caused by a threat.

The distinction between an agreement and a combination is not important as far as the Sherman Act is concerned but it is important in examining decisions to determine what has been decided.

In the fact situation now before the Court, the court of appeals found that there was evidence showing that the respondent, Isaksen, for a four month period, adhered to prescribed prices as the result of coercion. This clearly appears from the record. See Isaksen Petition for Writ of Certiorari in Case #87-610, at 6-8. There is no basis, we submit, for overturning this part of the court of appeals' decision. Any argument that *Colgate* and *Monsanto* should be regarded as authority for the proposition that coerced price fixing is permissible should be rejected. The *Colgate* dictum has been disavowed and should be expressly withdrawn.

ARGUMENT

I. A Contract May Be Formed Without Communication By The Offeree

As the court of appeals pointed out, the view of the Petitioner, Vermont Castings, with respect to footnote 9 of *Monsanto* would require a more explicit agreement under the Sherman Act than under contract law. Pet. App. p. 7a.

Suppose B has on hand a piece of patented, trademarked or copyrighted property for which he paid $50,000.00. A, the manufacturer, says to B that if B sells it for less than $100,000.00 A will not sell another piece of that equipment to B. B sells the item for $100,000.00 believing that he must do so in order to buy another. There is no contract. But there is action pursuant to a *threat* in the classic

meaning of the word. *N.L.R.B. v. Local 254, Building Service Employees Int. U.*, 359 F.2d 289, 291 (1st Cir. 1966). If A *promises* B that he will sell to B another item of that property for $50,000.00 if B sells the first for at least $100,000.00 and B so conducts himself, there is a contract even though B does not communicate to A his acceptance. *Williston on Contracts*, Third Ed. §68 (1957); *Restatement (Second) of Contracts* §54 (1981); *Compton v. Shopko Stores, Inc.*, 93 Wis. 2d 613, 625, 287 N.W.2d 720, 726 (1980) "[P]erformance . . . is also an overt manifestation of assent." *Williston*, §68.

II. Coerced Price Setting Is Not Allowed

From the earliest times this Court has held that illegal combinations prohibited by §1 of the Sherman Act occur when price maintenance is achieved as the result of coercion.

The terms "contract", "combination" and "conspiracy" in §1 of the Sherman Act were used in a broad sense of arrangements which had an effect upon prices, and were not used in the simple sense of a "contract". *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940). The Senate resolution, which in 1888 directed the formulation of the bill, sought measures to set aside, control, restrain or prohibit "all arrangements, contracts, agreements, trusts, or combinations between persons or corporations . . . which tend to prevent *free and full competition* . . . with such penalties and provisions . . . as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition." *Id.* at 493, n. 15 (emphasis by the Court).

Saying that "[t]he Sherman act has been so frequently and recently before this court as to require no extended discussion now" the Court in *Eastern States R.L.D. Asso. v. United States*, 234 U.S. 600, 609 (1914) repeated its

earlier holding in *Gompers v. Buck's Stove & Range Co.*, 221 U.S 418 (1911) that:

> "It [the Sherman act] covered any illegal means by which interstate commerce is restrained . . . whether the restraint be occasioned by unlawful contracts, trusts, pooling arrangements, blacklists, boycotts, coercion, *threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter.*" 234 U.S. at 611 (Emphasis added).

Federal Trade Com. v. Beech-Nut Packing Co., 257 U.S. 441, 455 (1922) held that the Sherman Act was violated by coercive methods "in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944) noted that in *Beech-Nut* the company "without agreements, was found to suppress the freedom of competition by coercion of its customers. . . ."

United States v. Parke, Davis & Company, 362 U.S. 29, 43 (1960), following *Beech-Nut*, and finding adherence to prices as a result of coercion, held that "an unlawful combination is not just such as arises from a price maintenance *agreement*, express or implied. . . ." (Emphasis by the Court)

Simpson v. Union Oil Company of California, 377 U.S. 13, 17 (1964) stated that "[w]e made clear in *United States v. Parke, Davis & Co.* . . that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. *We reiterate that view, adding that it matters not what the coercive device is.*" (Emphasis added)

Albrecht v. The Herald Co., 390 U.S. 145, 149, 150 n. 6 (1968) held that §1 of the Sherman Act "covers combinations in addition to contracts and conspiracies, express or

implied", that in *Parke Davis* "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination" and that "[u]nder *Parke, Davis* petitioner could have claimed a combination between respondent and himself, *at least as of the day he unwillingly complied with respondent's advertised price.*" (Emphasis added)

Many different types of coercive devices have been used whereby price maintenance has been secured and the courts of appeals have uniformly held that the combinations achieved violate §1 of the Sherman Act. *See, Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254-56 (2nd Cir. 1975), *cert. denied*, 425 U.S. 936 (1976) (surveillance and retaliation); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 53 (2nd Cir. 1980) (threats of non-renewal of annual lease); *Osborn v. Sinclair Refining Company*, 324 F.2d 566, 574 n. 13 (4th Cir. 1963) ("If the arrangement or combination between the seller and his dealers is put together through the coercive tactics of the seller alone, this is sufficient."); *Phillips v. Crown Central Pet. Corp.*, 602 F.2d 616, 627 (4th Cir. 1979) *cert. denied*, 444 U.S. 1074 (1980) ("Short-term leases have been found to be inherently coercive. . . . Plaintiffs . . . were threatened with abrupt cancellations. . . ."); *Guidry v. Continental Oil Co.*, 350 F.2d 342, 343 (5th Cir. 1965) ("A supplier may not use coercion on its retail outlets to achieve resale price maintenance." Use of short-term leases to secure prices.); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5th Cir. 1965) (same as *Guidry*); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 32-35 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972) (threats to vary "temporary competitive allowance" for dealers; the treatment of the plaintiff was deemed to be a threat to others); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976) (use of invoice forms to keep General Foods advised as to prices for major purchasers plus termination of dealership); *Bender v. Southland Corp.*, 749 F.2d 1205 (6th Cir. 1984) (abusive

audits, termination threats, threats of opening a competing franchise); *Q.R.S. Music Co. v. Federal Trade Commission*, 12 F.2d 730, 732-33 (7th Cir. 1926) (A manufacturer "cannot lawfully by agreement fix and enforce the price at which the retailers shall sell. . . . Nor can respondent accomplish the same result by means that do not rise to the dignity of an express agreement. . . ."); *Hewitt v. Joyce Beverages of Wisconsin, Inc.*, 721 F.2d 625, 628 (7th Cir. 1983) ("Of course, knowledge that Joyce had actually coerced some distributors might cause other distributors to comply. . . ."); *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982) aff'd 465 U.S. 752 (1984) ("An unlawful resale price maintenance scheme can be effected in either of two ways: . . . an express or implied agreement . . . or the manufacturer may secure adherence to its suggested resale price through coercion. . . ."); *Jack Walters & Sons Corp. v. Morton Bldg., Inc.*, 737 F.2d 698, 707 (7th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984) (the use of "persuasion and policing" in addition to announcement of a termination policy); *Arnott v. American Oil Company*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (threat of non-renewal of short-term leases and eventual cancellation of lease); *Canadian American Oil Co. v. Union Oil Co.*, 577 F.2d 468, 472 (9th Cir. 1978), *cert. denied*, 439 U.S. 912 (1978) (Denial of promised discount on price to dealer and eventual invocation of 90 day termination clause in gasoline supply contract. "We cannot say that the omnipresent threat of dealer contract cancellation for failure to conform one's retail prices to those announced by Union's price support program is not coercive."); *Sahm v. V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968) (threat to terminate which was made before termination); *Adolph Coors Company v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (reports to dealers that other dealers had been cut off or would be because of their prices); *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 732

F.2d 779, 780 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984) (on rehearing) ("[W]e do not construe *Monsanto* as a retreat from those cases holding that a combination occurs between a seller and buyers 'whose acquiescence in [the seller's] firmly enforced restraints was induced by "the communicated danger of termination." ' ")

None of the foregoing cases requires a communication from a coerced party to the coercing party that the coerced party is going to do what he is being coerced to do.

No one charged with participation in a crime by coercing another to do an unlawful act may escape punishment because he did not receive a communication from the coerced party. By the act of coercion the first expects the second to comply.

III. Neither *Colgate* Nor *Monsanto* Is Authority For The Proposition That Coerced Price Setting Combinations Are Permissible

In order to determine to what extent a case is a precedent it is necessary to examine the questions presented, which must be "in the context of a specific live grievance" and determine how the questions were decided. *Golden v. Zwickler*, 394 U.S. 103, 110 (1969).

In *United States v. Colgate & Co.*, 250 U.S. 300 (1919) the facts alleged in the indictment, which was dismissed by the district court upon a demurrer, were practically identical to those in *United States v. Parke, Davis & Company*, 362 U.S. 29 (1960).

Colgate decided that there could not be a combination without an agreement. *Beech-Nut* and *Parke, Davis* decided that there could be. Although the word "combination" was used in the *Colgate* indictment and there was no use of the words "agreement," "contract" or "conspiracy", this Court considered that the only question to be

decided was whether the indictment showed an agreement, saying:

> And we must conclude that, as interpreted below, the indictment does not charge Colgate & Company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the company. 250 U.S. at 306-307 (emphasis added).

As this Court stated in *Parke, Davis*, "[t]he *Colgate* decision distinguished *Dr. Miles* on the ground that the Colgate indictment did not charge the company with selling its products to dealers *under agreements* which obligated the latter not to resell except at prices fixed by the seller." 362 U.S. at 38 (emphasis by the Court).

What followed in the *Colgate* opinion with respect to the right to deal was unnecessary dictum, from which this Court departed three years later in *Beech-Nut*.

The *Colgate decision* that there must be an agreement in order to have a combination has been implicitly and repeatedly overruled by this Court, as shown in the preceding section of this brief.

The *Colgate dictum* with respect to the so-called right to deal has not been directly attacked in this Court but it has been so frequently and extensively circumscribed that there is nothing left of it, unless, as Vermont Castings claims, it has been reinstated by *Monsanto*.

In *Parke, Davis*, the Court did not address the question of whether the *Colgate* dictum should be *directly* overruled because "[t]he Government concedes *for the purposes of this case* that under the *Colgate* doctrine a manufacturer, having announced a price maintenance policy, may bring about adherence to it by refusing to deal with customers who do not observe that policy." 362 U.S. at 37 (emphasis added).

Four years after *Parke, Davis*, the Court, in *Simpson*, expressly made the point that "it matters not what the coercive device is", thus completely disavowing the *Colgate dictum*. *Simpson*, 377 U.S. at 17.

The *Monsanto* opinion of this Court did not reinstate the *Colgate decision* that an agreement was a requisite of a combination. Further, the *Monsanto* opinion did not reinstate the *Colgate dictum*. The *Monsanto* case in this Court reviewed *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982). The jury had been informed that Spray-Rite "had to prove the existence of an agreement, conspiracy or combination. . . ." *Id.* at 1234. However, the question as stated by the court of appeals was only whether "Monsanto and some of its distributors conspired. . . ." *Id.* at 1233. The *Monsanto* brief to this Court presented two questions both relating to a "price fixing conspiracy", the second of which asked "[c]an a *per se* unlawful vertical price-fixing *conspiracy* be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?" Brief of Petitioner Monsanto Company at page i, *Monsanto Company v. Spray-Rite Service Corporation*, 465 U.S. 752 (1984), (emphasis added). The Spray-Rite brief did not address the merits of the question as to the standard of proof of a conspiracy. Nor did it discuss combinations. It did not even cite *Colgate*. Brief of Respondent Spray-Rite Service Corporation, *Monsanto Company v. Spray-Rite Service Corporation*, *supra*. The issue stated by this Court in *Monsanto* reads: "This case presents a question as to the standard of proof required to

find a vertical price-fixing *conspiracy* in violation of §1 of the Sherman Act." 465 U.S. at 755 (emphasis added).[1]

Perhaps, because of the way the standard of proof question was presented to and stated by this Court, *Monsanto* lapsed for a moment into the previously repudiated treatment of a Sherman Act §1 combination as entailing an agreement or conspiracy. The Court recited question 1 of the verdict which related to a "conspiracy or combination", 465 U.S. at 758 note 2, but summarized the verdict

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[1]In this case, Isaksen presented to the court of appeals the question: "Is there sufficient evidence in the record to support each of the following answers of the jury to the following questions?", the first of which reads: "Did the defendant contract, combine or conspire with any of its dealers to set the retail price of Vermont Castings' stoves?" Isaksen argued to the court of appeals that *Parke, Davis, Beech-Nut* and *Eastern States R.L.D. Asso.* each held that an agreement is not a necessary part of a combination and that price setting achieved by coercion violated the Sherman Act, citing also the court of appeals decisions referred to above. *See*, Brief for Appellant, Greggar S. Isaksen at 1, 23-32. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158 (7th Cir. 1987). On the other hand, the Vermont Castings' brief in the court of appeals attempted to restate the issue only in the terms of a conspiracy, saying: "Did the trial court correctly conclude that there was insufficient evidence to sustain the jury's finding of a vertical price-fixing *conspiracy* in violation of section one of the Sherman Act, 15 U.S.C. §1?" (Emphasis added). Brief of Defendant-Appellee, Vermont Castings, Inc. at 1, *Isaksen v. Vermont Castings, Inc., supra.* And the court of appeals, reverting to the repudiated decision of *Colgate* which limited the term "combination" to situations where there is an "agreement", held that "there is insufficient evidence to justify an inference of *agreement* between Vermont Castings and its other dealers". Pet. App. p. 4a (emphasis added). And the court of appeals further stated that "[w]ith a *conspiracy* between Vermont Castings and its other dealers ruled out, the harassment of Isaksen could be actionable under section 1 of the Sherman Act only if it succeeded in getting him to *agree* to raise his prices." Pet. App. p. 5a (emphasis added). In the Vermont Castings Petition for Writ of Certiorari in this case #87-728 at i there is again an effort, as was true by the petitioner in *Monsanto*, to have this Court rule only in the terms of an agreement or a conspiracy.

as finding that the termination was pursuant to a "conspiracy". 465 U.S. at 757-758. "A conspiracy is constituted by an agreement. . . ." *United States v. Kissel*, 218 U.S. 601, 608 (1910), per Justice Holmes for the Court. But the short hand statement of the Court in *Monsanto* surely was not a deliberate reinstatement of the repudiated *Colgate* decision that an agreement is a necessary part of a combination as that term is used in the Sherman Act.

Monsanto did not hold that an agreement was necessary for a combination. *Monsanto* did not answer any question with respect to a combination. It did not hold that the Sherman Act permits a combination in restraint of trade achieved by coercion. If there were any such holding in *Monsanto*, it would have been unnecessary to the decision and would have been contrary to the decisions of this Court dating back as early as *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 438 (1911) and should be withdrawn.[2]

Monsanto did *not* reinstate the *Colgate* dictum as claimed at page 11 of the Vermont Castings petition. The nuance, "[u]nder *Colgate*", in the following quotation is missed:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor

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[2]We need not here attempt to disagree with the idea expressed in the form of a rule in *Monsanto* that a mere complaint by one person and subsequent action by another person are not, alone, sufficient evidence to support a finding that the two *agreed* upon the action. We note, however, that serious concern with that *Monsanto* pronouncement is being expressed in Congress in the form of the Freedom from Vertical Price Fixing Act of 1987 (H.R. 585) which has been approved by the House of Representatives Judiciary Committee's Monopolies and Commercial Law Subcommittee and S. 430 which has been approved by the Senate Judiciary Committee. See 53 Antitrust & Trade Reg. Rep. (BNA) 598 (Oct. 15, 1987).

> is free to acquiesce in the manufacturer's demand in order to avoid termination. 465 U.S. at 761.

The "[u]nder *Colgate*" sentences, instead of being a flat statement, are merely a reference to a prior dictum which may or may not have vitality. *Id.*

The "[u]nder *Colgate*" sentences state that a distributor is "free" to acquiesce in the price demands of the manufacturer in order to avoid termination. *Id.* The validity of this point was *not decided* in *Colgate* and it was *not decided* in *Monsanto.* It was rejected in *Beech-Nut*, *Parke*, *Davis* and *Simpson.*

The statement is internally inconsistent. A man is not "free" to give up his purse under a threat to his life. A man is not "free" to let someone else run part of his business under a threat of an entire loss of his business.

The court of appeals, below, recognized that in "a realistic sense" the *Colgate dictum* would permit coerced price setting. Pet. App. p. 8a. Counsel[3] for Vermont Castings acknowledge as much at page 11 of their Petition by admitting that under the *Colgate* arrangement "some dealers may have unwillingly agreed to charge suggested prices under the coercive threat of termination."

The *Colgate* dictum does not stand up against the holding of this Court in *Gompers*, 76 years ago, reiterated in *Eastern States R.L.D. Asso.* three years later, that the Sherman Act forecloses restraint of commerce by "coercion, threats, intimidation, and whether these be made effective, in whole or in part, by acts, words, or printed matter." *Gompers*, 221 U.S. at 438; *Eastern States*, 234 U.S. at 611. It does not stand up against the holding in

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[3]The Vermont Castings, Inc. brief in the court of appeals below disclosed that in addition to its Madison, Wisconsin counsel it is represented by the firm of Goodwin, Proctor and Hoar which is located in Boston, Massachusetts.

Simpson, 23 years ago, that "it matters not what the coercive device is." 377 U.S. at 17.

The *Colgate* dictum may have been influenced by the argument of counsel in that case that there can be no combination unless it is voluntary. *See*, Isaksen Petition for Writ of Certiorari at 21-22. This idea, however, has long ago been repudiated. *See*, *supra*, part II.

The dictum fails to take into account the statement of Congressman Culberson who was in charge of the bill for the Sherman Act in the House of Representatives that the reason a hypothetical contract between a manufacturer and a retailer governing prices offended the Sherman Act was that *"[t]he customers of the manufacturer are not allowed to sell at a lower rate than that fixed by the manufacturer." Isaksen Petition* at 20. (Emphasis added).

The *Colgate* dictum was wrong. It was not necessary for the actual (erroneous) decision in *Colgate* that a combination must be based on agreement.

We submit that the reference to the *Colgate* dictum in *Monsanto* was not necessary for the *Monsanto* decision or even for determination of the standard of proof announced by *Monsanto*. The *Colgate* dictum serves only as a scarecrow to be inadvertently picked up on occasion whenever time is not taken by counsel[4] and the Court to analyze the

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[4]*Colgate* was not even cited by the Spray-Rite brief and only in footnote 34 in the Monsanto principal brief submitted to this Court in the *Monsanto* case, and the footnote was appended to the statement in the brief that "manufacturers terminate distributors in the ordinary course of business for a host of independent reasons." Brief of Petitioner Monsanto Company at 34, *Monsanto*. In the brief of the United States as amicus curiae in *Monsanto*, the *Colgate* case was cited only in support of the proposition that a manufacturer's independent decision "about the pricing and distribution" of his product does not violate the Sherman Act. Brief for the United States as Amicus Curiae at 7, *Monsanto*. And in the reply brief of Monsanto, *Colgate* was cited, only with *Parke, Davis*, in connection with the assertion that motive for termination of a distributor is not material. Reply Brief of Petitioner Monsanto Company at 18, *Monsanto*. Yet it is on the basis of the *Monsanto*

place of *Colgate* in judicial history. The actual *decision* in *Colgate* equating a combination with an agreement has been repeatedly repudiated. Similarly, the *Colgate dictum*, which was impliedly repudiated in *Beech-Nut*, *Parke*, *Davis* and *Simpson*, should be expressly disavowed.

Summarizing, we respectfully submit that there is no basis for the Vermont Castings position that there must be a communication from the coerced party to the coercing party that the first is going to do what he is being coerced to do.

We pointed out in the Isaksen Petition for Writ of Certiorari, #87-610, that this matter is not a mere vertical price-fixing case. It is a horizontal case as well, involving elements of conspiracy and of a combination entailing coercion by one of many retail competitors which had economic control over the others, i.e. Vermont Castings, Inc., whereby a price structure has been adhered to in Wisconsin and throughout the country. Isaksen did not adhere to the structure, except for a period of four months, and was harassed and punished by the competitor that had the economic control with the cooperation of at least one other retail competitor.

Perhaps it was because the court of appeals below made the *Colgate* mistake of equating a combination with an agreement that it did not address the combinations. But they clearly existed in violation of §1 of the Sherman Act.

IV. Conclusion

In conclusion we respectfully submit that the Vermont Castings, Inc. Petition for Writ of Certiorari in this matter

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dictum that it is now strenuously argued that the *Colgate* dictum has been "decisively" resurrected by this Court. *See*, the Vermont Castings, Inc. Petition at ll-12. Vermont Castings, Inc. is wrong. This Court did *not decide* anything with respect to *Colgate* in *Monsanto*.

should be granted only if this Court grants certiorari in the Isaksen Petition in case #87-610; otherwise we respectfully submit that it should be denied.

Respectfully submitted,

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